IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

LIBERTY PROPERTY LIMITED PARTNERSHIP, Plaintiff, Counter-Defendant, v. 25 MASSACHUSETTS AVENUE PROPERTY LLC, Defendant, Counter-Plaintiff.	)	C.A. No. 3027-VCS

MEMORANDUM OPINION

Date Decided: January 22, 2009

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STRINE, Vice Chancellor.

I. Background

The Supreme Court has asked me to address two issues that it concluded I did not address in my original, fifty-page post-trial decision in this case.[1] Because that decision is detailed and available to the parties, the public, and the Supreme Court, I will not repeat the extensive fact findings and legal conclusions set forth in that decision, and this response to the Supreme Court's mandate assumes the reader's familiarity with my prior decision.

The basic fact scenario can be distilled thusly. Plaintiff and counterclaim-defendant Republic had an option to buy the relevant office property (the "Property") if certain conditions were met, most relevantly, that a contractually qualifying lease covering 85% of the Property's square footage was in place by a certain date (the "Option" and "Option Agreement"). After that date, if no qualifying lease was in place, a "Gap Period" arose during which defendant and counterclaim-plaintiff 25 Mass could sell the Property free and clear of Republic's Option. I say Gap Period because the right to sell is not explicit, but instead begins at the expiration of one of Republic's Option periods and ends at the commencement of another Option period.[2]

Republic attempted to exercise the Option before the Gap Period arose. It did so by tendering a "Master Lease" that it contended met the conditions in the Option Agreement. In Republic's view, which was not without some plausibility given the origins of the Option Agreement and the relationship of the owners of 25 Mass to

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[1] *See Liberty Prop. Ltd. P'ship v. 25 Mass. Ave. Prop., LLC*, 2008 WL 1746974 (Del. Ch. Apr. 7, 2008) (hereinafter "Post-Trial Op. at *--").
[2] *See* JX 31 ("Option Agreement") § 3.

Republic and its investors, the Master Lease met 25 Mass's contractual expectations, which had, in Republic's view, always been that Republic and its investors would have the chance to the buy the Property at a favorable price. After all, said Republic, it was on this basis that Republic's promoters when it went public – who also controlled 25 Mass – marketed Republic to investors. It was only, they say, when 25 Mass's principals were excluded from the management of Republic that they began to view things differently.

In my prior decision, I rejected Republic's attempt to exercise the Option. I found that the Master Lease was not one that a reasonable lessor would have found acceptable, and that 25 Mass therefore had no contractual duty to accept it. On that basis, I held for 25 Mass and dismissed Republic's claims.

But I also dismissed 25 Mass's counterclaim for damages. That counterclaim argued that Republic had, by virtue of having tendered up a non-qualifying lease and having used that tender to insist that it could exercise the Option, breached contractual duties it owed to 25 Mass. The damage that supposedly flowed from this breach was that 25 Mass could not consummate a sale of the Property to a buyer whose identity was never made known to it. Alternatively, 25 Mass, which all parties concede now controls the Property free and clear of any option on Republic's part, contended that it was harmed because the real estate markets got worse during the pendency of Republic's claim for specific performance of the Option.

But, 25 Mass could not point to any specific provision of the Option Agreement that specifically made it a breach for Republic to do what it had done, which was to argue to a court that it was entitled to specific performance of its right to exercise the Option before the Gap Period arose. Moreover, 25 Mass had eschewed any attempt to go to the courts of the District of Columbia, whose law governs the relevant contract and is where the Property is located, to obtain a release of the lis pendens Republic filed. 25 Mass also disclaimed any intent to argue that Republic's filing of a lis pendens was made in bad faith, making Republic subject to sanctions under the relevant District of Columbia statutory standard. Likewise, 25 Mass did not argue that Republic's litigation position was frivolous and sanctionable under Rule 11.

Instead, 25 Mass simply argued that if Republic failed in its attempt to specifically enforce its rights under the Option, then the necessary consequence would be that Republic was liable for breach of contract for any damages sustained by 25 Mass as a result of the uncertainty caused during the pendency of the specific performance claim and the lis pendens.[3] That was the entirety of its argument. Acknowledging that this argument was not buttressed by explicit contractual language — such as a non-suit clause — 25 Mass argued that the mere filing of a lis pendens and unsuccessful specific performance claim breached the implied covenant of good faith and fair dealing. Meanwhile, 25 Mass adamantly insisted that it was not accusing Republic of bad faith, meaning engaging in conduct sufficient to give rise to sanctions under the District of Columbia lis pendens statute or Rule 11.

[3] 25 Mass essentially framed this as a strict liability argument: "If Republic is correct, then its demand for specific performance was justified. But if it is wrong and it was not entitled to exercise the Option, then Republic should be held liable for the damages it caused." 25 Mass Rep. Br. at 22.

25 Mass did not burden the court in its post-trial brief with many pages that articulate this argument, and for good reason. The argument was stark, simple, and involved no subtlety.

In my post-trial decision, I dealt with 25 Mass's argument in support of its counterclaim in two places. At the beginning of the post-trial decision, I summarized my reasons for dismissing the counterclaims as follows:

> Under the American rule, which applies in the District of Columbia, a losing party to litigation does not indemnify the winning party for any harm suffered merely as a result of the fact that a claim did not succeed. Here, the building owner is unable to identify any specific contractual obligation that the option holder breached by its futile attempt to exercise the option. For a Delaware judge to improvise and impose a consequence for the filing of a lis pendens based on a showing that would not satisfy the statute adopted by the District of Columbia's own government would be a strange and unprincipled exercise in common law making, displaying disrespect for the legislative branch of the District of Columbia by judicially inventing a remedy to address a problem that the policymakers with legitimacy have already addressed in a specific manner.[4]

In Section I.V. of my decision, which was some five pages long, I explained more fully the basis for this reasoning.[5]

On appeal, 25 Mass has apparently argued that I failed to address the arguments it made to me in support of its counterclaims. I draw that conclusion from the Supreme Court's November 2, 2008 order (the "Remand Order"), which stated in pertinent part:

> (6) 25 Mass argues that the Court of Chancery erred in failing to find that Republic breached its implied duty of good faith and fair dealing. The Court of Chancery opinion states, "As I find Republic did not act in bad faith in seeking to protect its perceived rights under the Option Agreement, I

[4] Post-Trial Op. at *2.
[5] *See* Post-Trial Op. at *19-21.

find no occasion to shift fees or award damages for the filing of [the] lis pendens."[6]

(7) The District of Columbia Court of Appeals has addressed the meaning of good faith performance. The court has held that under District of Columbia law, "[A]ll contracts contain an implied duty of good faith and fair dealing, which means that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'"[7] "If [a] party to [the] contract evades the spirit of the contract, willfully renders imperfect performance, or interferes with performance by the other party, he or she may be liable for breach of the implied covenant of good faith and fair dealing.["][8] In *Allworth v. Howard Univ.*[9] the court stated, "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with justified expectations of the other party; it excludes a variety of types of conduct characterized as [involving] 'bad faith' because they violate standards of decency, fairness or reasonableness."[10] Although the Vice Chancellor determined that Republic did not act in bad faith, he did not expressly address Republic's liability for breach of the implied duty of good faith and fair dealing, as that duty has been defined under the law of the District of Columbia. The two concepts – bad faith and conduct not in good faith are not necessarily identical. Accordingly we must remand for the Court of Chancery to consider this claimed breach of the Option Agreement.

(8) 25 Mass also argued that Republic breach Paragraph 8(c) of the Option Agreement, which states, "[E]ach party shall . . . cause to be taken all such other and further actions as any of them may reasonably request in order to effect the transaction contemplated by this Agreement."[11] 25 Mass argued in its Post-Trial Brief that the sale of [the Property] during the Gap Period was a contract right contemplated by both parties; therefore, by filing its specific performance lawsuit Republic breached Paragraph 8(c) of the Option Agreement.[12] 25 Mass requested an expedited trial before the deadline of the third party sale, or in the alternative, that Republic permit 25

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[6] *Liberty Prop. Ltd. P'ship v. 25 Mass. Ave. Prop., LLC*, 2008 WL 1746974, at *21 (Del. Ch. Apr. 7, 2008).
[7] *Paul v. Howard University*, 754 A.2d 297, 310 (D.C. 2000) (quoting *Hais v. Smith*, 547 A.2d 986, 987 (D.C. 1988)).
[8] *Id.*
[9] 890 A.2d 194 (D.C. 2006).
[10] *Id.* at 201-202 quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt.a.
[11] (A-53).
[12] Post Trial Opening Br. for Def./Counter Pl. 25 Mass. Ave. Prop. LLC at 8.

> Mass to sell [the Property] and place the proceeds from the sale in escrow pending Republic's claim for monetary damages. Republic rejected both proposals, thereby making it legally impossible for 25 Mass to convey clear title to the purchaser. Because the Court of Chancery did not expressly address this alleged breach of Paragraph 8(c) in its opinion, we must remand for a determination of that claim as well.[13]

The Supreme Court has ordered that I consider these issues again. I do so now.

II. Implied Covenant Of Good Faith And Fair Dealing

First, as to the claim for breach of the implied covenant of good faith and fair dealing, my reasoning remains identical to what it was previously. By an express statute, the District of Columbia Council has indicated that the public policy of the District of Columbia is that the filing of a lis pendens that is later lifted only gives rise to consequences such as damages if a stringent sanctions standard is met.[14] In my view, that expression of a legislative branch is critically important and cannot be lightly overridden by a judge acting under the guise of strained contract interpretation. 25 Mass must be presumed to have known about that law when it signed a contract involving a property in the District of Columbia that had an express choice of law provision choosing District of Columbia law. As noted in my previous decision, there are contracts that provide for consequences when one party brings litigation against the other, is unsuccessful, and

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[13] *25 Mass. Ave. Prop. LLC v. Liberty Prop. Ltd. P'ship*, C.A. No. 3027 (Del. Nov. 25, 2008) (ORDER) at 4-6 (hereinafter "Remand Order").

[14] D.C. CODE § 42-1207(d). The statute provides that "[w]hen appropriate, [a] court may impose sanctions for the filing" of a lis pendens. The District of Columbia Court of Appeals has interpreted this to mean that the statute requires a showing that the suit was not prosecuted in good faith in order to impose sanctions. *See Heck v. Adamson*, 941 A.2d 1028, 1030 (D.C. 2008). The District of Columbia has taken a different approach than some other states, which permit a party injured by a lis pendens that is lifted to recover any resulting damages. *See, e.g.*, CAL. CIV. PROC. CODE § 405.34 (West 2009); *Med. Facilities Dev., Inc. v. Little Arch Creek Props., Inc.*, 675 So.2d 915, 917-18 (Fla. 1996) (interpreting FLA. STAT. § 48.23(3)).

damages to the other party result.[15] The contract at issue in this case did not do so. In the United States of America, a party's unsuccessful application to have a contract enforced does not give rise to even fee shifting under the "American Rule," much less an argument that by merely litigating unsuccessfully, the party was committing a breach of contract.[16]

Indeed, the very reason that 25 Mass made one of the weakest moves to the hoop a party can make in a case involving a lengthy, complex agreement — basing an argument on the premise that the other party breached an implicit obligation — is that nothing in the express words of the detailed Option Agreement could reasonably be read to support its position. And, 25 Mass then coupled that weak move to the hoop with a disclaimer of any intent to prove that Republic had acted or litigated in bad faith.

The implied covenant of good faith and fair dealing, as recognized in the District of Columbia, prevents a contractual party from acting in bad faith and engaging in unfair dealing that prevents the other side of the contract from getting its fair bargain.[17] 25 Mass did not argue that Republic had litigated in bad faith. At best, it argued that Republic should not have insisted on seeking specific performance and should have let 25 Mass close with its anonymous buyer (assuming that the anonymous buyer turned into an identified buyer with a binding obligation to buy). But, again, 25 Mass disavowed any

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[15] *See* Post-Trial Op. at *20.

[16] *See Schneider v. Dumbarton Devs., Inc.*, 767 F.2d 1007, 1016-17 (D.C. Cir. 1985) (rejecting argument that plaintiff had breached a settlement contract by suing on it where the contract contained no express covenant not to sue); *see also Bridgeport Music, Inc. v. Universal Music Group, Inc.*, 440 F. Supp. 2d 342, 345 (S.D.N.Y. 2006) ("When parties have differing positions as to the meaning of a contractual term, it can not be deemed a breach for one party to sue to enforce its view of the contract.").

[17] *See Allworth v. Howard Univ.*, 890 A.2d 194, 201 (2006); *Hais v. Smith*, 547 A.2d 986, 987-88 (D.C. 1988).

chance to show that Republic's request for specific performance was brought in bad faith, in the sense that would have given rise to fee shifting under Delaware law and justified sanctions for filing a frivolous lis pendens under the District of Columbia statute.

In my view, it was improper for me, as a judge, to simply invent — by the guise of "implication" — a contractual duty on Republic's part to refrain from making a non-frivolous claim for specific performance and from filing a lis pendens when: 1) the parties could have included a non-suit clause in the Option Agreement and did not; and 2) the parties chose District of Columbia law and District of Columbia law does not provide for consequences for a lis pendens filing unless the filer engaged in conduct meeting a stringent sanctions standard. In so ruling, I was fully cognizant that I had rejected Republic's claim for specific performance. But, in the American system, the fact that a party's breach of a contract claim failed does not mean that the party therefore breached that contract simply by making the rejected claim.

In that respect, I was especially surprised by the portion of the remand order that said that although I had "determined that Republic did not act in bad faith," I had not "expressly address[ed] Republic's liability for breach of the implied good faith and fair dealing, as that duty has been defined under the law of the District of Columbia. The two concepts – bad faith and conduct not in good faith are not necessarily identical."[18] When I read that, I was chagrined and wondered whether I had somehow missed a subtle doctrinal and linguistic argument that 25 Mass had made to me about District of Columbia contract law.

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[18] Remand Order at 5.

I consulted the post-trial briefs and found that I had not. 25 Mass did not argue that Republic's conduct, while not amounting to bad faith, was "not in good faith." By its own words, the District of Columbia Court of Appeals has said that "good faith performance . . . excludes a variety of types of conduct characterized as involving 'bad faith.'"[19] Although it may be the case that linguists can draw a distinction between "conduct not in good faith" and "bad faith conduct," 25 Mass made no argument that this subtle and, in my view, unprincipled distinction had ever been embraced by the law of the District of Columbia. For various understandable reasons, statute writers and judges may prefer a phrase like "not in good faith" to the stark phrase "bad faith" without intending to imply any substantive difference. Candidly, I am not sure when 25 Mass began to argue that "not in good faith" is different than "bad faith." What I can say is that 25 Mass never made such an argument in its post-trial briefs.

If 25 Mass had, I would have had the chance to address the issue fairly, with input from Republic. But, given the record I have, I find no basis to innovate and articulate a doctrine of "neutral faith" in which a contracting party has acted in a manner that, while not in bad faith, is also not in good faith. Given the long-standing use of the concept of good faith to articulate the state of mind appropriate for various actors (such as for a loyal fiduciary) and the use of the concept of bad faith to label someone whose state of mind is violative of the appropriate standard,[20] one would think this concept of "neutral faith"

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[19] *Allworth*, 890 A.2d at 201-02 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a).
[20] *See, e.g.*, *Lofland v. Cahall*, 118 A. 1, 3 (Del. 1922) ("Directors of a corporation are trustees for the stockholders, and their acts are governed by the rules applicable to such a relation, which exact of them the utmost good faith and fair dealing . . . ."); *Perrine v. Pennroad Corp.,* 47 A.2d

would have been embraced in American law before now if it had any logic or utility. I do note that in our corporate law, this court has firmly rejected the notion that the words "not in good faith" mean something different than "bad faith," and has done so on sensible policy, logical, and linguistic grounds.[21]

479, 549, 552 (Del. 1946) ("[T]he Directors of Pennroad Corporation had authority to enter into this agreement of settlement, if they acted in good faith. . . . [W]e cannot say that the settlement . . . is so grossly inadequate that it shows bad faith on the part of the directors of a corporation who approve it."); *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107, 114 (Del. 1952) ("In the case at bar there is no evidence that any of the Mayflower's directors acted in bad faith or from corrupt motives in determining that a merger should take place."); *Abelow v. Symonds*, 184 A.2d 173, 466, 470 (Del. Ch. 1962) (holding that the court was required to exercise its judgment as to "whether the evidence show[ed] that the directors in fact used the utmost good faith and the most scrupulous fairness" and, in that case, the plaintiffs' "contentions f[e]ll wide of [demonstrating] bad faith"); *In re J.P. Stevens & Co., Inc. Shareholders Litigation*, 542 A.2d 770, 780-81 (Del. Ch. 1988) ("[A] decision made by an independent board will not give rise to liability (nor will it be the proper subject of equitable remedies) if it is made in good faith and in the exercise of due care. A court may, however, review the substance of a business decision . . . for the limited purpose of assessing whether that decision is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith." (citations omitted)).

[21] Under Delaware law, a corporation may exculpate directors from liability for certain fiduciary breaches, but may not eliminate liability for "acts or omissions not in good faith." 8 Del. C. §102(b)(7). This court has repeatedly stated that to plead a non-exculpated claim under this statute — i.e., to plead an act or omission was not in good faith — a plaintiff must demonstrate that the defendants acted in bad faith. *See, e.g.*, *In re Lear Corp. S'holder Litig.*, 2008 WL 4053221, at *10 ("To respect this authorized policy choice made by Lear and its stockholders [in adopting a § 102(b)(7) charter provision] . . . the plaintiffs must plead facts supporting an inference that the Lear board . . . acted in bad faith . . . ."); *McMillan v. Intercargo Corp.*, 768 A.2d 492, 501-02 (Del. Ch. 2000) (holding that, to state a claim in the face of an exculpatory provision, a plaintiff claim the defendants engaged in "bad faith, self-interested, or other intentional misconduct rising to the level of a breach of the duty of loyalty"); *In re Lukens Inc. Shareholders Litigation*, 757 A.2d 720, 734 n.38 (Del. Ch. 1999) ("[W]here plaintiffs do not allege facts that 'even inferentially' suggest bad faith or harmful intent, those claims are 'precluded' by the § 102(b)(7) provision (quoting *In re Dataproducts Corp. Shareholders Litig.*, 1991 WL 165301 (Del. Ch. Aug. 22, 1991))). Our Supreme Court has also taken this approach. *See, e.g.*, *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27, 67 (Del. 2006) (equating the phrase "not in good faith" to "bad faith" throughout, for example, in stating, "*failure to act in good faith* may be shown, for instance, [in three different situations]. There may be *other examples of bad faith* yet to be proven or alleged, but these three are the most salient.") (emphasis added); *Malpiede v. Townson*, 780 A.2d 1075, 1094-95 (Del. 2001) ("Had plaintiff alleged such well-pleaded facts supporting [an inference of] bad faith . . ., the Section 102(b)(7) charter provision would have been unavailing . . . .").

I see no basis why the contract law of the District of Columbia would act contrarily and embrace this novel distinction, given the cautious way the implied covenant of good faith and fair dealing should be employed by the judiciary in view of the harm that an overbroad use could do to parties' justified expectations of commercial and other important aspects of freedom when the express terms of contracts do not limit their scope of action.[22] Indeed, if the price of entering into contracts with express limitations on commercial flexibility is subjecting oneself to wide-ranging exposure to liability for breaching judicially discovered interstitial restrictions on commercial activity, parties might be dissuaded from entering into otherwise mutually beneficial economic arrangements. Precisely because one is holding someone responsible for an *implied* duty, it is critical that the standard be rigorous, that the obligation breached be clearly implied, and that the party act with an improper state of mind, that is, bad faith. Where, as here, all that a party has done is to have litigated and lost, and its opponent cannot point to any express contractual bar on such conduct and has not argued that the litigation was commenced or prosecuted in bad faith, I do not see a basis for holding that there was a breach of the implied covenant of good faith and fair dealing.[23] Put simply, I

[22] *Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 92 (3d Cir. 2000) ("[T]he bad faith cause of action [should be limited] to those instances where it is essential. . . . If construed too broadly, the doctrine could become an all-embracing statement of the parties' obligations under contract law, imposing unintended obligations upon parties and destroying the mutual benefits created by legally binding agreements.").

[23] Courts routinely decline to provide a remedy under the implied duty where the parties' relationship is already defined through express statutory provisions or contract terms. *See, e.g.*, *Hais*, 547 A.2d at 987-88 (refusing to impose a contractual obligation that "good judgment or a kind heart might have dictated" because it was not contemplated by the agreement); *Jacobsen v. Oliver*, 201 F.Supp. 2d 93, 98 n.2 (D.D.C. 1996) (dismissing claim based on the implied duty because it was identical to claim for professional malpractice); *Northview Motors*, 227 F.3d at 92

continue to reject what remains, at bottom, 25 Mass's argument, which is that if Republic lost on its claim for specific performance, it committed a breach of an implied contractual obligation by that simple fact.

III. Section 8(c)

Having addressed the Supreme Court's first issue on remand, I turn to the second one. This issue involves 25 Mass's argument that Republic did breach an express provision of the Option Agreement, namely § 8(c). Here is the entirety of the argument that 25 Mass submitted to me on that point in its post-trial opening brief:

> In addition to 25 Mass' right to sell [during the Gap Period], Section 8(c) of the Option Agreement (entitled "Further Assurance") required the parties "to take or cause to be taken all such other and further actions as any of them may reasonably request in order to effect the transactions contemplated." JX 31, § 8(c). One of the transactions clearly contemplated was a Sale of the Property to a third party during the Interim Period. Thus, Republic also breached § 8(c) of the Option Agreement by preventing this sale from closing.[24]

In its post-trial reply brief, 25 Mass repeated this argument in an equally cursory manner.[25]

25 Mass contended on appeal, I surmise from the Remand Order, that Republic's insistence on litigating its specific performance claim and its refusal to lift the lis pendens

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(rejecting claim for implied duty because there were "detailed provisions setting forth both contractually and statutorily the parties' obligations and rights"); *Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 617-18 (3d Cir. 1995) (rejecting claim for implied duty because it was not tied to a specific contractual term).

[24] 25 Mass Post-Tr. Op. Br. at 8.

[25] *See* 25 Mass Post-Tr. Rep. Br. at 28 ("Whether viewed as a breach of the express provisions of the Option Agreement—both Section 3 and Section 8(c)—or as a breach of the implied duty of good faith and fair dealing, one thing is certain . . . ."); *id.* at 30 ("And consistent with their mutual rights and obligations to buy and sell the Property during these three windows, the Option Agreement obligated both parties to cooperate 'to effect the transactions contemplated by this Agreement.' [Option Agreement] § 8(c).").

until the specific performance claim was adjudicated amounted to a failure to "take action" reasonably requested by 25 Mass in order to allow it to effect a transaction contemplated by the Option Agreement, to wit, 25 Mass's desire to consummate a sale of the Property to the anonymous buyer. That is, by refusing to drop a claim that 25 Mass did not contend was brought frivolously, Republic breached a contractual obligation it supposedly had to affirmatively aid 25 Mass in closing its deal with the anonymous buyer.

I do not think the language of § 8(c) can be read as a negative covenant imposing strict liability on Republic for seeking, but not obtaining, an order of specific performance, and thereby clouding 25 Mass's ability to sell during the Gap Period. For starters, the Gap Period is a gap between Republic's two Option periods, and 25 Mass's right to sell during that period is not expressed as an affirmative contract right. Rather, 25 Mass could sell during the Gap Period because Republic's Option rights were not in force during that period. In my view, the "transactions contemplated" language in § 8(c) is most reasonably addressed to transactions specifically covered by the Option Agreement.[26] In that regard, § 8(c) seems intended as a covenant imposing affirmative obligations on the parties to take actions toward closing transactions that are specifically addressed in the Option Agreement.[27]

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[26] *See Davis v. Yageo Corp.*, 481 F.3d 661, 676 n.10 (9th Cir. 2007) (reasoning that a further assurances clause does not affect transactions that are not part of the agreement).
[27] *See, e.g.*, *True North Commc'ns Inc. v. Publicis S.A.*, 711 A.2d 34, 39 (Del. Ch. 1997) (characterizing further assurances clauses as "catchall contract provision[s] by which a party, after making a precise commitment to perform in some manner, makes a vague, more general

More fundamentally, I think it strains the contractual words to turn Republic's refusal to abandon a non-frivolous claim for specific performance of its Option right into a refusal to take action to effect a contractually contemplated transaction. Had the parties wished to impose contractual liability on Republic for any harm it occasioned to 25 Mass by litigating over its Option rights, one would have expected the Option Agreement to contain an explicit non-suit or liability-shifting clause of some kind that actually mentioned litigation, or at least some provision far less remote than § 8(c). Instead, the Option Agreement specifically preserves Republic's right to enforce its Option by seeking an order of specific performance with no mention of consequences for an improvidently brought suit, thus leaving those consequences to be determined by the applicable default law.[28]

Section 8(c) is a fairly standard further assurances clause, and I do not believe it is reasonably read as governing this particular context.[29] The Option Agreement expressly contemplated specific performance as a remedy. Moreover, the parties were operating

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commitment to take other actions that are incidental to, and necessary for, *the performance of the core commitment*") (emphasis added).

[28] Section 14(k) of the Option Agreements reads in its entirety:

> In the event that [25 Mass] or [Republic] fail to perform any of their obligations with respect to the purchase of the Property after the Option to purchase such Property has been exercised by [Republic], the non-defaulting party shall be entitled to exercise all remedies available to the non-defaulting party under applicable law, *including the remedy of specific performance*.

(emphasis added).

[29] Many model forms and practice guides for real property transactions recommend the inclusion of a further assurances clause, usually as a "miscellaneous" or "general" provision, that obligates the parties to take what reasonable further action may be necessary to complete the transactions contemplated by the agreement or to carry out the agreement's purpose. *See, e.g.*, 1 MILLER & STARR CALIFORNIA REAL ESTATE FORMS § 1:15 (Section 42); NEW YORK FORMS: LEGAL AND BUSINESS § 1:39 (Section 9(e)); 1 STUART M. SAFT, COMMERCIAL REAL ESTATE FORMS 3D § 2:87; 12 THOMPSON ON REAL PROPERTY § 99.15(f).

under District of Columbia law and presumably knew that District of Columbia law only imposes adverse consequences for filing a lis pendens that is later lifted if the filing resulted from sanctionable misconduct, and that the American Rule and Rule 11 set an equally high bar for the imposition of fee shifting and other consequences on losing parties in litigation. The general provisions of § 8(c) do not limit Republic's specifically granted contractual and statutory right to non-maliciously pursue specific performance of its Option rights.

I also note that 25 Mass cannot argue that it could not have entered into a binding contract for sale of the Property during the Option Agreement; what it alleges is only that it could not deliver clear title until the lis pendens was lifted and Republic's claim for specific performance was adjudicated. In large transactions, it is not uncommon for there to be closing conditions and for parties to agree to buy a Property subject to clearing of regulatory hurdles or other obstacles.[30] Put simply, Republic did not engage in conduct that prevented 25 Mass from entering into a binding contract for the sale of the Property with a buyer with commercial patience. This is not to say that the filing of the lis pendens was a small thing, it is only to say that it was not at all an absolute bar to the entry of a contract by 25 Mass.[31]

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[30] *See, e.g.*, 2 STUART M. SAFT, COMMERCIAL REAL ESTATE FORMS 3D § 10:12 (Section 6.1(b)) (form agreement requiring seller to obtain releases from all liens and encumbrances on the property before closing); *see also* 1 MILLER & STARR CALIFORNIA REAL ESTATE FORMS § 1:21 (Section 6) (describing common closing conditions in commercial real estate transactions); 12 THOMPSON ON REAL PROPERTY § 99.07 (same).

[31] 25 Mass says that its anonymous buyer, with whom it never had direct discussions, was unwilling to wait.

In conclusion, I adhere to my original determination that 25 Mass's counterclaim should be dismissed. That counterclaim, in my view, requires a court to write into a heavily negotiated commercial agreement a provision that does not exist, and by doing so effectively create, by judicial fiat, a consequence attached to the filing of a lis pendens that the District of Columbia Council could have adopted, but chose not to.